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### THE ESSENCE OF CONTRABAND.

Among all the shifting enumerations of articles of contraband which we find in treaties and authors of the formative period of modern international law, it is not infrequent to hear it said that no certain common principle can be discovered. Some things, manifestly warlike, are included; but then some things, manifestly unwarlike, are included too; and, apparently, capriciously and arbitrarily.

Some have rushed to the conclusion that anything may be contraband that can help the enemy. Others have maintained that the inclusion of innocent articles was a mistake and an illegality. Others have concluded that, whilst the general conception of contraband was a very restricted one, it did admit of a certain elasticity within narrow limits.

The last view is that which the present writer put forward in a necessarily short and imperfect sketch of the subject recently published.<sup>1</sup> It seems desirable here to indicate what is the spring of the elasticity referred to. It is this: that the true essence of the conception of contraband is that the article shall have a warlike connotation—shall be intimately bound up with the idea of war. This is obviously a conception which will be interpreted

<sup>1</sup> War: Its Conduct and Legal Results, Baty & Morgan, 1914, p. 370.

by different persons in somewhat different ways; and thus it is that we find the occasional inclusion in the category of horses, money and naval stores. The question of provisions is not considered because it is only *qua* naval stores that they have regularly been treated as contraband. The sweeping interdictions of provisions proclaimed by France and Great Britain in 1793 were avowedly based on entirely special circumstances, such as the alleged fact that the French Government was not a normal member of the family of nations, and that famine was a lawful weapon against nations as much as against besieged cities.

The inclusion of money, inexplicable on any other ground, is explained by this principle that contraband is that which connotes war. No commoner phrase is current than that which couples war and money, declaring that money is "the sinews of war". In an age of elementary political economy, money was not only highly useful in war, but the idea of bullion and specie, treasure, was bound up with the idea of war. But no one says, "Cotton is the sinews of war", or, "Copper is the sinews of war".

Why, again, were the horse, and masts and sails and pitch for the ship, contraband,<sup>2</sup> whilst lead and iron were not? Surely the former had as important civil uses. Perhaps they had; but they had not the sentimental connotation of the horse and the ship with war. In the old days when cavalry still retained its character of the queen of battles, horses naturally suggested thoughts of war, despite their civil uses. With the introduction of gunpowder and artillery, "villainous saltpetre" and infernal sulphur had the same military connotation; and, despite their unmanufactured state, were treated as contraband. In peace, the ship, the horse, sulphur and saltpetre, were alike surrounded with a warlike aura. But who can say the same of copper or cotton? It may come to be said in the future, but the future is irrelevant to the present discussion.

Pitch and tar, in a naval war, were invested with the same military connotation. It is not because they were useful or in-

<sup>2</sup>One or two instances of their inclusion by conventional stipulation can be found. That does not affect the principle.

dispensable for the equipment of navies, but because they smelt of naval conflict, that they were treated as contraband. Every ship was a potential privateer; every ship was a ship of force; every seaman a potential man-of-warsman. So strongly was this felt, that an innocent merchant seaman was a fair prisoner of war. So strongly was it felt, that the British Nation, which spurned conscription, admitted (and admits) in the case of seamen, the press gang. Ships, even in peace-time, were bound to accept Admiralty control. Ships, even in peace, suggested warships. Tar and pitch at once suggested ships. Who said "tar", said naval combat.

This was the very extreme of the conception of contraband. When horses and ships were treated as contraband it was because the horse and the ship had a real military character. To appreciate the point of view of the old days, we must throw ourselves into their *milieu*. Saturated with the classics and the Old Testament, the people of the Renaissance looked on the horse as the very emblem and symbol of war. The cavalier, *chevalier*, was the typical warrior. Penetrated by the knowledge that the ship was ever armed, and ever ready to defend herself against the wrecker, the pirate and the Algerine, they were conscious of a warlike connotation in the ship, and the things that had a predominating maritime flavour.

Those days have passed. Cavalry is no longer the queen of battles, but artillery. The horse and the ship no longer suggest to us the combat. But will anyone pretend that copper and cotton do, apart from factitious agitation?

On the other hand, drums, which do not help an army very much, are stamped with the idea of war, and consequently are contraband. It is not their usefulness in war, but their special appropriateness for war, that makes things such.

The point so often insisted on, that raw material can never be contraband, really rests on the same great principle, that the essence of contraband is warlike connotation. For an unspecialized raw material can seldom have a specialized flavour of war. Yet it can have it. Sulphur, saltpetre, horses had it, whilst lead, iron, charcoal, carts, all equally indispensable, never had.

The school of Hautefeuille and Ortolan, which demands that raw material must always be exempt, triumphed in the framing of the Declaration of London in 1909. And indeed, at the present day, it is difficult to find any raw material which has a definite military flavour, unless it be certain rare materials used in making explosives. But, in principle, the exclusion of raw material from the category of contraband is only a particular case of the exclusion of articles possessing in themselves no military connotation. It is, however, such a luminous principle, and affords such a safe and certain guide, that it might well be accepted as a distinct rule of International Law, if indeed it has not already become such.<sup>3</sup>

The principle also clearly explains why the parts of military weapons are contraband, whilst the raw material of them is not. The former can be put together, the latter can be worked up. Why should they not be treated alike? Not, as Kleen thinks,<sup>4</sup> because the result of the process is a *different* thing in the latter case and the *same* thing in the former, but because the component parts are stamped with a military character, and the raw material is not.

It may of course be urged that the rule of military connotation is dangerously lax; and that it would assist a belligerent to assume to treat as contraband anything which he so desired. That is true; but it is a very much safer and more certain rule than the modern rule of subjective destination to military use, which belligerents for the last half century have been endeavoring to set up. It needs no invocation of conflicting evidence; it involves no holding-up of vessels whilst a case is got up against their cargoes. It is a matter of general judicial knowledge which a Prize Judge ought to decide in the high exercise of his great function. His government ought not to attempt to instruct him; for it is a matter on which they have no title to speak. Is, or is not, a given material such as would raise in the mind of an indifferent person the image of war? That is not a

<sup>3</sup> Kleen: *Contrabande de Guerre*, p. 151. (Paris, 1893.)

<sup>4</sup> *Ibid.*, p. 152.

question which can be determined by governments. It does not depend on the occult matters of policy or diplomacy to which Stowell alluded in *The Fox* <sup>5</sup> as proper subjects for governmental guidance to the Judge. It is the plainest question of common knowledge, for it is a question of the common understanding.

The advantage of the conception is that it entirely removes from the category of contraband things which are merely indispensable to, or useful to, the enemy in his campaign. The question is put on a general basis, and is simply: Has the article a military flavour? The further question, of whether this aroma can arise in the particular circumstances of the shipment (accidental contraband) is doubtless to be answered in the negative. Stowell's detection of it when innocent goods were going straight to a port of equipment opens a wide door, which has been pushed back of late so as to lead to results which would have greatly astonished him. In *The Imina*,<sup>6</sup> he allowed contraband to go to port which he held in *The Jonge Pieter* <sup>7</sup> to be too suspiciously near Holland for British merchants to trade at. In *The Stert* <sup>8</sup> and *The Luna* <sup>9</sup> he refused to extend a blockade to neutral ports although it was alleged that the result would be to render the blockades illusory. In *The Frau Margaretha* <sup>10</sup> he allowed articles to go to Quimper, which he would not have permitted to go to Brest, forty miles away. The authority of Stowell cannot be invoked for any wide interference with the trade of neutral ports; the military aroma only arises when the goods are very specially and directly connected with military places.

We must infer, at the very least, that the occasion which converts innocent goods into contraband must be at least equally strong with the circumstance of the carrier trying to enter a port of enemy equipment. Their consignment *ex facie* to an enemy government, or to its exclusive agent, seems the only circum-

<sup>5</sup> (1811) Edw. Adm. 320.

<sup>6</sup> (1800) 3 C. Rob. Adm. 167.

<sup>7</sup> (1801) 4 C. Rob. Adm. 79.

<sup>8</sup> (1801) *Ib.* 66.

<sup>9</sup> (1810) Edw. Adm. 690.

<sup>10</sup> (1805) 6 C. Rob. Adm. 92.

stance which can carry the same weight. One is driven to the conclusion that the real remedy for the present difficulties is the abandonment of the sanctity with which the Declaration of Paris has somehow become invested. So long as the enemy's goods can traverse the seas in safety, provided they are not contraband, so long will the temptation to enlarge the category of contraband be irresistible.

And it must be remembered that since the Declaration of London, the neutral carrier of contraband, however innocent the cargo seems, loses his ship. The neutral carrier of enemy goods was not only safe, but received his full freight.

The instinct of the United States, in declining to accede to the Paris Agreement, was based on a sound intuition. The humanitarian provisions of that instrument came before their time. It could lead to no good purpose to enact a complaisance for which the world was not ready. Belligerents have broken out of its meshes by revolutionizing the conception of contraband, and the last state of the neutral, if their ideas are adopted, will be worse than the first.

The writer is not concerned to inquire whether the inclusion of money, ships, sails, tar, and horses in the denomination of contraband was right or wrong. In his opinion it was wrong. But the point is, that the ground of their inclusion was not that they were useful, or indispensable, to the enemy, but that they had in themselves an intimate and special, if sometimes a sentimental, connection with warlike operations.

*T. Baty.*

*London.*